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No. 88-202

In the Supreme Court of the United States

OCTOBER TERM, 1988

VICTOR HERRERA-DIAZ, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, JANET MARY HERRERA-DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the appeals court correctly determined that petitioner's medical malpractice claim against the government accrued when petitioner's mother was informed that petitioner's injury, which was later determined to be due to the government's negligence, was caused by a lack of oxygen to the brain around the time of birth.

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OPINIONS BELOW

The decision of the district court is unreported. The decision of the court of appeals (Pet. App. A-1 to A-16) is reported at 845 F.2d 1534.

JURISDICTION

The Ninth Circuit entered its judgment and opinion on May 4, 1988. Petitioner filed his petition for writ of certiorari within ninety days of the Notice of Entry of Judgment. This Court has jurisdiction under 28 U.S.C. 1254(a).

STATEMENT

Petitioner seeks review of the court of appeals' application of the accrual standard set forth in *United States* v. *Kubrick*, 444 U.S. 111 (1979), to petitioner's medical malpractice claim brought under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* ("FTCA").

In 1977, petitioner was born two months premature at the Naval Regional Medical Center at Camp Pendleton, California. At birth, petitioner experienced breathing problems and remained in the Medical Center for five months (Pet. App. A-4). When petitioner was three months old, petitioner's mother was told by an attending physician that petitioner had suffered brain damage at the time of birth. Petitioner's mother was not told the cause of the brain damage and did not inquire as to the cause (*ibid.*). In explaining her failure to seek additional information concerning the reason for petitioner's condition, she stated, "I guess I really didn't want to know. Brain damage is enough for me. I didn't ask" (Pet. App. A-4).

In April 1978, petitioner and his mother moved to New York where petitioner was admitted to United Cerebral Palsy Treatment and Rehabilitation Center to obtain specialized care for cerebral palsy (Pet. App. A-4). At that time, a physician informed petitioner's mother that cerebral palsy often occurred in premature babies and was caused by a lack of oxygen to the brain around the time of birth (*ibid.*). Petitioner's mother again failed to make further inquiries as to the cause of his injury.

In 1984, six years later, petitioner's mother was contacted by her present counsel, who suggested that petitioner might have a claim against the United States (Pet. App. A-5). Petitioner filed an administrative claim, which was denied. Petitioner thereafter filed suit under the FTCA in June 1985, alleging that "[n]avy * * * personnel

had been negligent in managing his delivery, and had fraudulently concealed and misrepresented their 'complicity in causing [his] birth injuries' " (*ibid.* (brackets the court's)).

The district court dismissed petitioner's suit as untimely under the two-year statute of limitations imposed by 28 U.S.C. 2401(b) (Pet. App. A-3). The court of appeals affirmed (*ibid.*). The court explained that, according to the standard set forth in *United States* v. *Kubrick*, 444 U.S. 111 (1979), "[t]he action accrues, and the statute of limitation starts to run, when a 'plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, both his injury and its cause' " (Pet. App. A-7 (quoting *Davis* v. *United States*, 642 F.2d 328, 331 (9th Cir. 1981), cert. denied, 455 U.S. 919 (1982)). Applying that test to this case, the court of appeals noted that petitioner's mother was told in 1978 that petitioner had brain damage caused by lack of oxygen at the time of birth (Pet. App. A-8). The court concluded that, at the time she obtained this information about her child's condition, "she knew, or in the exercise of reasonable diligence should have discovered, both Victor's injury and its cause" (*ibid.*). At that point, the court ruled, the statute of limitations began to run and petitioner had the " 'burden to ascertain the existence and source of fault within the statutory period' " (*ibid.* (quoting *Davis*, 642 F.2d at 331)).[1]

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[1] The court of appeals rejected petitioner's claim of fraudulent concealment, stating that "[t]here is no evidence of fraudulent concealment or misrepresentation in the record." (Pet. App. A-8). See also 28 U.S.C. 2680(h) (barring any claim based on, *inter alia*, misrepresentation or deceit). Petitioner does not seek review of this ruling.

ARGUMENT

The court of appeals' application of the accrual standard of *Kubrick* is not only correct but is heavily factbound and does not conflict with any decision of any other court of appeals. Further review is therefore unwarranted.

Petitioner expressly concedes that there was actual knowledge of the injury, cerebral palsy, and its cause, lack of oxygen, in 1978—six years before petitioner filed this malpractice action (Pet. 4). Petitioner nevertheless argues that this knowledge is insufficient, and that petitioner's mother did not know the "true cause" of his injuries until her attorneys informed her, in May of 1984, that they "were the result of mismanagement of labor and negligence on the part of government doctors" (*ibid.*). Only at that point, petitioner contends, did the statute of limitations begin to run.

Petitioner's argument that this action could not have accrued until his mother knew of the causal connection between petitioner's injury and the treatment administered at birth is not supported by the case law and is without merit. First, to the extent that petitioner suggests that the claim did not accrue until his mother had knowledge that the physician's management of petitioner's delivery was negligent, his position has been expressly rejected by this Court in *Kubrick*. There, the Court stated that "[w]e * * * cannot hold that Congress intended that 'accrual' of a claim must await awareness by the plaintiff that his injury was negligently inflicted" (444 U.S. at 123). The Court thus refused to equate "a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause" (444 U.S. at 122).

However, petitioner is also mistaken in his assertion that, even if knowledge of negligence is not required, a claim does not accrue until the claimant ascertains that his

injury is traceable to "human acts or omissions" (Pet. 4). The Court's holding in *Kubrick* dictates no such inflexible requirement, and the courts of appeals have recognized that a malpractice claim can accrue even though a claimant's knowledge falls short of an awareness of the causal role of human conduct. Rather, the claimant need only have sufficient knowledge of injury and "facts about the cause of his injury" (*Kubrick*, 444 U.S. at 123) to suggest to the reasonable person the possibility of negligent treatment, and to motivate that person to make further inquiries.

Other courts of appeals, in decisions cited by the appeals court below (Pet. App. A-7 & n.2), have correctly applied this principle in circumstances similar to those presented in this case. In *Arvayo* v. *United States*, 766 F.2d 1416 (10th Cir. 1985), the appeals court held that parents' knowledge of their son's injury (brain damage) and its cause (meningitis), coupled with their awareness that one physician had failed to recognize the condition shortly before it had been properly diagnosed, was sufficient knowledge of the "injury and its cause" to prompt a reasonable person to make additional inquiries and thus to commence running of the statutory period. Although the court conceded that the parents did not *know*, at the time of accrual, that the physician's failure to make the diagnosis—or any "act or omission" on the part of the physician—was the ultimate cause of the injury, it concluded that "under the circumstances of [the] case, [the parents] had a duty to inquire as to [that] cause." 766 F.2d at 1421.

The Seventh Circuit, in *Nemmers* v. *United States*, 795 F.2d 628 (1986), held that a cause of action for malpractice accrued, although the claimant's parents were unaware that the treatment he received caused his condition, when the parents were informed of the possibility that his injury was caused by "trauma at birth." The court

rejected the plaintiff's argument that, under *Kubrick*, knowledge of "birth trauma" was insufficient to accrue the claim, stating that "the would-be plaintiff need not know that the injury is iatrogenic (induced by a physician)" (795 F.2d at 632). Rather, a claim accrues "when a reasonable person would know enough to prompt a deeper inquiry into a potential cause" (*ibid.*). That condition can be satisfied when the circumstances suggest a potential nexus between the medical condition and conduct that might constitute malpractice.[2]

These courts of appeals correctly applied the *Kubrick* standard, and recognized, as did the appeals court below, that *Kubrick* does not mandate tolling the statute of limitations until a claimant is informed that his injuries are traceable to conduct on the part of medical personnel.[3]

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[2] Similarly, the Ninth Circuit, in *Fernandez* v. *United States*, 673 F.2d 269 (1982), has previously held that awareness of the "medical" cause, or etiology, of an injury can place a reasonable claimant on notice of the possibility of malpractice such that a cause of action accrues. In that case, the court held that when parents were informed that their child's brain injuries were due to yellow jaundice at birth, they "knew, or had available the means of knowing all there was to know about the cause of his injuries, and who (the nurses and doctors who diagnosed and treated his jaundice) were responsible" (673 F.2d at 271). At that point, "they not only knew of the injury and that it was caused by the jaundice, they also knew, or would have known * * * [if] they had inquired, and if there were merit in the case * * * that there was a possibility that * * * earlier diagnosis and treatment would (or might) have prevented the sad after-effects" (*ibid.*). Thus, in the circumstances of that case, knowledge of a "medical" cause sufficed to satisfy the requirements of *Kubrick*, though there was no actual awareness that the actions of medical personnel may have been to blame.

[3] The Fifth Circuit's holding in *Waits* v. *United States*, 611 F.2d 550, 553 (1980), cited by petitioner (Pet. 11), turns on the peculiar facts of that case and is not at odds with the decision of the appeals court below. In that case, the claimant sought private treatment for a leg infection after it was treated unsuccessfully at a Veteran's Administration (VA) Hospital. The court held that although the claimant knew that his injury—amputation of the leg—was "caused" by a leg infection, he was not in full possession of the critical facts needed to

The requirement that the claimant be informed of the causal nexus between his condition and action by a physician would impose "a duty of *disclosure* on the part of doctors, rather than a duty of *inquiry* on the part of plaintiffs'" (*Arvayo* v. *United States*, 766 F.2d at 1422). Yet *Kubrick* imposes just such a duty of inquiry on patients—a duty that ripens at such time as the claimant posseses the knowledge that would lead a reasonable person to investigate, or to seek professional advice. The claim accrues at that point, since "[i]f [the claimant] does ask and if the defendant has failed to live up to minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff" (*Kubrick*, 444 U.S. at 122).[4]

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establish the VA's responsibility for his injury until he was later given access to his VA medical records. Only at that point did the claim accrue, since until the hospital records were delivered "[the claimant] did not know, and with expectable inquiry did not and could not learn, that the VA Hospital had negligently injured him." Thus, *Waits* is distinguishable from the instant case, since petitioner, at all times, had full access to the medical records revealing that negligent mistreatment was responsible for his brain damage.

Additionally, petitioner contends (Pet. 6-7, 11) that the decision of the court of appeals in this case is in conflict with the district court's reasoning in *Lee* v. *United States*, 485 F. Supp. 883 (E.D.N.Y. 1980) and *Jackson* v. *United States*, 526 F. Supp. 1149 (E.D. Ark. 1981). We recognize that the decision in *Lee* is in substantial tension with the approach of the court below. As a decision at the district court level, however, that case does not present a conflict of the sort that warrants the attention of this Court.

[4] Contrary to Judge Norris's dissent (Pet. App. A-12 to A-13), *Kubrick* is not fairly read to require awareness of cause in the sense of "knowledge that a human agent may have contributed to the injury." Under the peculiar facts of *Kubrick*, knowledge of the cause of the plaintiff's deafness injury—administration of the drug neomycin—necessarily involved knowledge that a physician's action was responsible for the plaintiff's condition. Not every case of malpractice fits this pattern. At times, negligent medical care is only one of a number of possible explanations for the medical condition that results in the

In the instant case, petitioner's mother was told that his condition was due to lack of oxygen at birth. Although mismanagement of delivery was not the only possible explanation for lack of oxygen at the time of birth, the court correctly determined that physicians had imparted to petitioner's mother enough information concerning cause to suggest that petitioner's brain damage was due to negligent treatment.[5] At that point, petitioner's mother "knew, or had available the means of knowing, all there was to know," *Fernandez*, 673 F.2d at 271, about the reason for petitioner's condition. The burden was on petitioner to "diligently ascertain[]" whether "he ha[d] been legally wronged" (*Kubrick*, 444 U.S. at 123 n.10).

Instead, petitioner waited six years after full knowledge of the underlying facts to institute this action, and only did so after being informed that there was a possible cause of action. Petitioner does not suggest that such advice could not have been obtained with equal ease during the limitations period had petitioner been reasonably diligent "by seeking advice in the medical and legal community" (444 U.S. at 123). The underlying principles of repose embodied in Section 2401(b), recognized and applied in *Kubrick*, 444 U.S. at 117, cannot be reconciled with such delay. Here, as in *Kubrick*, to excuse petitioner's failure to

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injury. However, the medical information supplied to the claimant, though it does not assign human responsibility, may nevertheless be sufficiently suggestive of possible negligence to prompt a reasonable person to investigate, and thus to satisfy the requirements of *Kubrick* for the accrual of the claim.

[5] The court also correctly held, contrary to petitioner's argument, that the burden to ascertain the existence and source of fault must be governed by an objective standard, and that his mother's youth and emotional distress were therefore not relevant considerations in determining whether she had been "placed on notice in 1978 to make any inquiry as to how [petitioner's] injury was caused" (Pet. App. A-7).

make a reasonable inquiry "would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government" (444 U.S. at 123 (footnote omitted)).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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